APPENDIX

112 Ga.App.516, 415 S.E.2d 622

"WYMAN C. LOWE

v.

JAMES T. BAILEY et al,

JAMES T. BAILEY et al,

v.

WYMAN C. LOWE,

Nos. 413,41391.

"Court of Appeals of Georgia,

Division No. 3

Sept 8, 1965

"Rehearing Denied Oct. 22, 1965

"Personal injury action. The Superior Court, Fulton County, Jeptha C. Tanksley, J., overruled defendant's general demurrer and defendant brought error. The Court of Appeals, Bell, P. J., held that personal injury action commenced on September 16, 1963, based on injury sustained on September 16, 1961, was barred by two-year statute of limitations.

"1. Time

Day of injury is to be counted in determining whether action for personal injuries was brought within two-year period of limitation and no fractions of days are recognized. Code, Sec. 3-1004

"2. Time

Personal injury action commenced on September 16, 1963, based on injury sustained on September 16, 1961, was barred

by two-year statute of limitations.

"1. Time

Day of injury is to be counted in determining whether action for personal injuries was brought within two-year period of limitation and no fractions of days are recognized. Code, § 3-1004.

"2. Time

Personal injury action commenced on September 16, 1963, based on injury sustained on September 16, 1961, was barred by two-year statute of limitations. Code, § 3-1004.

"3. Limitation of Actions

Running of statute of limitations was not suspended for two days after plaintiff sustained personal injuries even if during that period injury coupled with anesthesia administered to him resulted in state of shock such that plaintiff was mentally insane. Code, §§ 3-801,3-1004.

"Wyman C. Lowe, Atlanta, for plaintiff in error.

Nall, Miller, Cadenhead & Dennis, Edward White, Thomas Allan Rice, Atlanta, for defendants in error.

"Syllabus Opinion by the Court

"BELL, Presiding Judge.

"Plaintiff brought an action for injuries to his person. The petition alleged the injuries occurred on September 16, 1961. The petition was filed on September 16, 1963.

"[1,2] Actions for injuries to the person shall be brought within two years after the right of action accrues." Code § 3-1004. The day of the injury must be counted in determining whether the action was brought within the period of limitation, and no fractions of days are recognized. Thus this action, commenced on September 16, 1963, based on an injury occurring on September 16, 1961, is barred by the statute. Dowling v. Lester, 74 Ga. App. 290, 292 (1), 39 S.E. 2d 576; Gibson v. Kelley, 88 Ga. App. 817, 78 S.E.2d 76.

"[3] By amendment to his petition the plaintiff alleged in substance that due to the pain and suffering he endured for two days after the injury coupled with anesthesia having been administered to him, he was in a state of shock, mentally incompetent to transact business and was insane. These things he contends, tolled the running of the statute for two days following his injury. See Code § 3-801.

"There is no merit in this contention.

"Statutes of limitation are considered as beneficial, and resting on principles of a sound public policy, and as not to be evaded except by the methods provided therein. Indeed, they are now termed 'statutes of repose,' and are regarded as essential to the security of all men. *** And courts cannot engraft on such statutes exceptions not contained therein, however inequitable the enforcement of the statute, without such exceptions, may be. Harrison v. Holsenbeck, 208 Ga. 410, 412, 67 S.E. 2d 311, 313; See Bank of Jonesboro v. Carnes, 187 Ga. 795, 798, 2 S.E. 2d 495, 130 A.L.R. 1.

"The judgment of the trial court overruling the general demurrer which expressly invoked the bar of the statute of limitation is reversed.

"The above ruling renders it unnecessary for us to review the error assigned in the main bill of exceptions. The error there assigned was that the trial court erred in sustaining the defendant's general demurrer based on the ground that the petition stated no cause of action.

"Judgment reversed on the cross bill of exceptions. Main bill dismissed."

PARAGRAPHS 15-19, INCLUSIVE, OF PLAINTIFF'S AMENDED PETITION, FILED DECEMBER 11,1964 AS AMENDED BY AN AMENDMENT FILED DEC. 29,1964.

"15.

"While petitioner was pulling the mower up the incline at one time at about 5 P.M. said date, September 16, 1961, the blade struck a small pebble. The mower then moved onto the top of the toes of petitioner's left foot and onto that part of that foot which the toes adjoined. The said boy, at the time the blade struck a pebble, thereby causing the mower to slightly jerk the rope; pulled on the end of the rope towards the top of the incline and thereby pulled, or helped to pull, the mower onto top of the toes and said part of petitioner's left foot. He so acted in, pulling on the rope, in violation of the said instructions petitioner had given him not to pull on the rope at any time while petitioner was operating the mower up and down said incline unless petitioner lost his grasp of the handlebar and thereby allowed the mower to roll down the incline.

"The boy, at that time , while he was holding an end of the rope with the other end attached to the handle of the mower, and thereby assisting petitioner in operating the mower on the incline was acting with the approval and consent of said Bailey and as his agent and servant as herein before set out in paragraph 6 and 14 of this Amended Petition. The boy was negligent in so causing, or helping to cause, the mower to get on top of petitioner's toes and part of his left foot and thereby cause the said injuries. His said negligence was imputable to his father, who himself was also negligent directly in permitting the mower to be used by petitioner and said boy on the incline in said manner, which he knew to be unsafe and dangerous.

"16.

"The rapidly revolving blade, which then had a jagged and no smooth cutting edge, then cut or tore off the largest toe, the toe adjoing it and about two-thirds of the middle toe of petitioner's left foot, cut all of the tendons on top of the foot leading to said toes by cutting across the top of a part of the foot, cut off some of the portion of the top of that foot said three toes had adjoined, caused lacerations and bruises on the other two toes, and on other part of the foot also. Said cutting or tearing, lacerating and bruising by said blade directly and proximately caused petitioner to begin immediately suffering severe and excruciating physical pain and mental anguish, to continue to suffer such pain and anguish for at least a week thereafter, and in less and varying degrees from then

until the date of filing of this Amended Petition, December 11, 1964, and to go into a state of shock immediately, which continued until the performance on his left foot of the operation hereinafter stated. Sensory nerves of a highly sensitive nature as to pain had led from the foot into the three toes that were so severed.

"17.

"Petitioner remained at the scene of said accident for about a half hour after its occurrence. He was then carried by ambulance to the Emergency Room in Crawford W. Long Hospital in Atlanta, Georgia. Later that night, beginning about 10:00 P.M., an operation that lasted more than two hours was performed on his left foot by a surgeon, Dr. Frank Wilson, Jr., a regular member of the staff of the Hospital.

"Petitioner remained on a hospital carriage in the Emergency Room of the Hospital for about 2½ or three hours before the carriage, with him on it, was moved into the operating room of the Hospital.

"The said severe pain and state of shock, which began immediately upon occurrence of said injuries, and continued until anesthesia, which anesthesist began administering to him in the Operating Room at about 9:45 P.M. took effect within about 5 minutes later, caused petitioner immediately upon, occurrence of, the accident, to become and remain mentally semi-conscious until he was rendered fully mentally unconscious about 9:50 P.M. that night from the administer-

"ing of anesthesia to him. While he was in the emergency room, he received injections of sedatives, which helped relieve some of the severity of the pain, but also helped dull his mental faculties further and caused them to remain so dulled until about 9:50 P.M. that night, when the anesthesia took fully effect and he became totally unconscious.

"He remained fully mentally unconscious from about 9:50 P.M. that night, because of the continued administering of anesthesia to him and said state of shock. The anesthesia was administered to him in compliance with instructions given in advance by said Doctor Frank Wilson, Jr., until 12:15 A.M. the next morning, September 17, 1961. Said operation that Dr. Wilson advised him needed to be done on his injured left foot was performed by said Dr. Wilson in said operating room during most of the time from about 10 P.M. that night until 12:15 A.M., the next morning, September 17, 1961. During that period of total unconsciousness, petitioner was not aware of, and knew nothing whatever occurred and had complete lost of use of his mental faculties.

"For the next hour and a half following 12:15 A.M., said morning, petitioner was not more semi-conscious mentally, that being due to the persisting effect of the anesthesia.

"18.

"From the time of happening of his said injuries in the late afternoon of September 16, 1961, until he became fully unconscious at 9:45 P.M. that night from administering of anesthesia, said severe pain,

"state of shock, and semi-conscious condition of petitioner was such that he was totally mentally and physically incapacitated. From 9:45 P.M. said night until 1:15 A.M. or later the next morning, September 17, 1961, the continuance during that period of the said condition of shock, the continuance from 9:45 P.M. said night until 12:15 A.M. the next morning of the totally unconscious condition induced by continued administering of anesthesia, and the continuance of the semi-conscious condition from 12:15 A.M. until 1:15 A.M., September 17, 1961, resulting from the lasting effect of the anesthesia caused petitioner to be totally mentally and physically incapacitated from 9:45 P.M. that night until 1:15 A.M. the next morning also. In connection with and as a result of petitioner's condition in the stated intervals of time, his mind was unsound and deranged from the time of occurrence of his injuries until 1:15 A.M., September 17, 1961.

"19.

"Because of petitioner's said mental and physical condition from time of occurrence of his said injuries in late afternoon of September 16, 1961, until 1:15 A.M., September 17, 1961, he did not throughout that period of time have mental capacity to transact any business, he was totally mentally and physically incapacitated so as to be incapable of acting for himself in carrying on his business and profession and in prosecuting his claim for damages arising from his said injuries, he was mentally incapacitated from contracting in any way and his mind was unsound and deranged to such extent that he could not comprehend the meaning and significance of

"what he did or failed to do.

"The Supreme Court and Court of Appeals of Georgia have each rendered a number of unreversed decisions ascribing certain meanings and giving certain interpretations to the word "insane" as it appears in Georgia Code Section 3-801, entitled "Persons under Disability". One such decision rendered by the Supreme Court of Georgia is that, throughout a period a person does not have mental capacity to transact any business, he is "insane". Such a decision rendered by the Georgia Court of Appeals is that, throughout a period a person is mentally and physically incapacitated as to be incapable of acting for himself in carrying on his business and prosecuting his claim for damages arising out of physical injuries he has received, he is "insane". Other such decisions rendered by one of said Georgia Appellate Courts are that (1) throughout a period a person is mentally incapacitated from contracting he is insane; that (2) throughout a period a person's mind is so unsound and deranged that he cannot comprehend the meaning and significance of what he does or fails to do he is "insane"; and that (3) throughout a period he is totally, mentally and physically incapacitated a person is "insane".

"Under the provisions of Georgia Code Section 3-801 and on basis of meanings ascribed by the Georgia Supreme Court and Georgia Court of Appeals to the Word "insane" as used in said Code Section, time limitation applicable to this action was suspended from time of happening of said injuries at about 5 P.M., September 16, 1961, the time of accrual of petitioner's

"cause of action until 1:15 A.M., September 17, 1961. This is true because, as heretofore alleged, from time of happening of said injuries, about 5 P.M., September 16, 1961, until 1:15 A.M., September 17, 1961, petitioner did not have the mental capacity to transact any business, and he was totally mentally and physically incapacitated, so as to be incapable of acting for himself in carrying on his business and profession and in prosecuting in any way his claim for damages arising from said injuries, and he was mentally incapacitated from contracting in any way, and his mind was unsound and deranged to such extent that he would not comprehend the meaning and significance of what he did or failed to do; and because the Georgia Supreme Court and Georgia Court of Appeals have ruled in unreversed decisions that any person injured in Georgia is 'insane', as that word is used in Georgia Code Section 3-801, for any period from the time of accrual of his cause of action arising from such injuries that from the time of the accrual of such cause of action he does not have the mental capacity to transact any business, or is totally mentally and physically incapacitated, so as to be incapable of acting for himself in carrying on his business or profession and in prosecuting in any way his claim for damages arising from his injuries, or is mentally incapacitated from contracting in any way, or his mind is unsound and deranged to such extent that he can not comprehend the meaning and significance of what he does or fails to do."

THE SUPREME COURT OF THE UNITED STATES

WYMAN C. LOWE,

Petitioner for Certiorari

vs.

JAMES T. BAILEY and
MRS. JAMES T. BAILEY,

Respondents in Certiorari

PETITION FOR WRIT OF CERTIORARI FOR REVIEW OF JUDGMENT OF THE COURT OF APPEALS OF GEORGIA

The opinion delivered upon the judgment of the Court of Appeals of Georgia upon a cross-bill of exceptions, of which judgment WYMAN C. LOWE, in effect, seeks review, by petition for writ of certiorari, is officially reported in "JAMES T. BAILEY and MRS. JAMES T. BAILEY v. WYMAN C. LOWE", 112 Ga. App. 516, 145 S.E. 2d 622. As shown also on said pages of 112 Georgia Reports and 145 Southeastern Reports, 2nd, the Court of Appeals of Georgia dismissed the main bill of exceptions in "WYMAN C. LOWE v. JAMES T. BAILEY and MRS. JAMES T. BAILEY", after sustaining the said cross-bill of exceptions. A copy of the opinion and judgment of that Court of Appeals upon the cross-bill of exceptions is at the beginning of the Appendix attached hereto.

The main bill of exceptions in said last stated appeal to the Court of Appeals of Georgia by Wyman C. Lowe, plaintiff, was as

to that part of a final order of the Superior Court of Fulton County, Georgia, rendered and entered on February 4, 1965, sustaining general demurrers of the defendants, James T. Bailey and Mrs. James T. Bailey, to the plaintiff's petition as finally amended on grounds it did not state a cause of action. The said cross-bill of exceptions by the said defendants was as to another part of the order of the Superior Court of Fulton County, Georgia which overruled general and special demurrers of said defendants, wherein the defendants contended the action was barred by a two-year statute of limitations contained in Georgia Code Sec. 3-1004, the original petition having been filed on September 16, 1963 and the cause of action having arisen on September 16, 1961. That part of said order, rendered and entered on February 4, 1965, overruling the general and special demurrers based on the statute of limitations reads:

"It is ORDERED therefore:

"(a) That Grounds 4 and 5 of the defendants renewed and additional demurrers filed December 16, 1964 and as further renewed on January 6, 1965 to the plaintiff's petition as finally amended are hereby overruled".

No opinion was rendered in connection with the overruling of the demurrers based on the statute of limitations.

There was no official reporting of said final order and the opinion therein as to the other said general demurrers.

The judgment of the Court of Appeals of

Georgia, reported in 112 Ga. App. 516, 145 S.E. 2d 622, in effect sought to be reviewed, was rendered and entered on September 8, 1965.

Wyman C. Lowe, named defendant in error in said cross-bill of exceptions, filed within the time required by the Rules of said Court of Appeals a timely motion for re-hearing and reconsideration in that Court of Appeals. On October 22, 1965, that Court of Appeals by order denied the said motion, without a re-hearing having been held.

Within ten days after the entering of the order of the Court of Appeals denying the said motion, Wyman C. Lowe gave written notice to the Clerk of the Court of Appeals of his intention to apply to the Supreme Court of Georgia for a writ of certiorari for review of said judgment. On November 22, 1965, a Monday, thirty-one days after the entering of the order of the Court of Appeals denying the motion, he filed a petition with the Clerk of the Supreme Court of Georgia for writ of certiorari for review of said judgment. As the Rules of the Supreme Court of Georgia require the filing of such application within thirty days after the entering of such order denying such motion and further provide, in effect, that if the thirtieth day is on a Sunday, such application may be filed the following Monday, the application was timely filed. On January 11, 1966, the Supreme Court of Georgia rendered a one-sentence order or judgment denying the application for such writ of certiorari, and that order was entered on a later date.

On an application of Wyman C. Lowe, petitioner, received by the Clerk of this Court within ninety days after the entering of said order of the Supreme Court of Georgia, Honorable Hugo Black, Justice of this Court, rendered an order extending the time for applying for writ of certiorari in said cause until and through May 11, 1966. On application of petitioner for further time extension of twenty days, received by the Clerk on May 11, 1966, Honorable Earl Warren, Chief Justice of this Court, on or about May 12 or 13, 1966, extended the time for said purpose until and through May 31, 1966. On application of petitioner for a final extension of eight days received by the Clerk of this Court on May 31, 1966, Mr. Justice Black by order rendered on June 1, 1966, extended the time for filing petition for writ of certiorari in said cause until and through June 8,1966.

The judgment of which this petitioner, in effect, seeks review by this Court is that part of the judgment of the Court of Appeals rendered on September 8, 1965, wherein there was reversed that part of the judgment of the Superior Court of Fulton County, Georgia quoted on Page 2 hereof which overruled the general and special demurrers of the defendants based on alleged bar of the plaintiff's cause of action by the statute of limitations set forth in Georgia Code §3-1004. Copy of said entire judgment and the opinion delivered thereon is on Pages i through iv of the Appendix attached hereto. The last three paragraphs read:

> "The judgment of the trial court overruling the general demurrer which expressly invoked the bar of the sta-

"tute of limitations is reversed.

"The above ruling renders it unnecessary for us to review the error assigned in the main bill of exceptions. The error there assigned was that the trial court erred in sustaining the defendant's general demurrer based on the ground that the petition stated no cause of action.

"Judgment reversed on the cross bill of exceptions. Main bill dismissed."

The portions of the transcript of the record transmitted to the Court of Appeals by the Clerk of the said Superior Court relating to the issue as to whether or not plaintiff's petition as finally amended in said Superior Court set out a cause of action are, therefore, irrelevant in connection with the review in this Court of the part of said judgment which reversed the overruling of the general demurrer of the defendants invoking the bar of a statute of limitations. Only those parts of the transcript of the record transmitted to the Clerk of said Court of Appeals that relate in any way to the question of whether or not the Trial Court erred in overruling the general demurrer of the defendants invoking alleged bar by said statute of limitation were included in petitioner's designation to the Clerk of the Court of Appeals of the portions of the record, including the proceedings in the Court of Appeals, to be included in the transcript to be certified by and sent by him to the Supreme Court of Georgia. The remainder of the transcript of the record transmitted to the Clerk of that Court of Appeals by the Clerk of the Fulton Superior Court was extraneous as to that issue. That is

why petitioner will send with the forty printed copies of this application a transcript, certified by the Clerk of the Supreme Court of Georgia, of the portions of the record certified to the Supreme Court of Georgia by the Clerk of the Court of Appeals, instead of sending a transcript of the entire record certified to the Clerk of the Court of Appeals by the Clerk of the Superior Court of Fulton County, Georgia. All of the record, including the proceedings in the Court of Appeals, germane to the questions of whether or not the Court of Appeals erred in reversing the overruling by the Fulton Superior Court of the general demurrer invoking alleged bar by the statute of limitation contained in Georgia Code §3-1004 and thereby violated the "due process of law" clause in the Fourteenth Amendment of the United States Constitution is, therefore, included within the transcript certified by the Clerk of the Supreme Court of Georgia which will be sent with the printed copies of this application to the Clerk of this Court. The Clerk of the said Court of Appeals has informed petitioner that he did not retain a copy of the transcript of the portions of the record that he certified and transmitted to the Clerk of the Supreme Court of Georgia.

The statutory provisions which petitioner believes confer on this Court jurisdiction to review said part of the judgment of the Court of Appeals which reversed the overruling by the Trial Court of the general demurrer invoking the alleged bar by said statute of limitations are embodied in Paragraph (a) of §2101 and in §1251 of Title 28 of the Ann. Code of the United States, the applicable parts of said Sec-

tions being as follows:

"Any other appeal or any writ of certiorari intending to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Section 2101 of Title 28 of the U.S. Code.

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:

".....

"By writ of certiorari where any title, right, privilege or immunity is specially set up or claimed under the Constitution .....or statutes.....or authority exercised....."

Section 1251 of Title 28 of the U. S. Code.

The opinion and judgment of the Court of Appeals of Georgia now before this Court for review show that the Court considered and applied only Section 1004 of Title 3 of the Georgia Code in reaching the decision in the judgment that plaintiff's petition filed on a Monday, September 16, 1963, when his injuries for

which he sued for damages in the petition occurred exactly two years before then, about 5 P. M., on a Saturday, September 16, 1961. Said Georgia Code Section, in effect, provides that actions for injuries to the person, except as to the reputation, shall be brought within two years after the right of action accrues.

Section 801 of Title 3 of the Georgia Code entitled "Persons under disability" provides, among other exceptions stated therein, that a person who is "insane" at time his cause of action accrues shall have the same time after his disability has been removed to bring an action as is prescribed for other persons. Plaintiff, Wyman C. Lowe, alleged in Paragraphs 17, 18 and 19 in his petition as finally amended that he was, in effect "insane" from the time of occurrence of his physical injuries about 5 P. M., September 16, 1961 until 1 A. M. the next day, September 17, within certain broad meanings ascribed by the Supreme Court and Court of Appeals of Georgia to the word "insane" as it appears in said Code Section 3-801. In Paragraphs 15 through 19 of his petition as finally amended, he stated and described in detail what his mental and physical condition was during said about eight hours that caused him to be "insane" within meanings given said word "insane" in Georgia Code Sec. 3-801.

One of the main questions presented for review is whether or not his allegations in Paragraphs 15 through 19 of his petition as finally amended as to his mental and physical condition from the time of occurrence of his physical injuries about 5 P. M., September 16, 1961, until about

1 A. M. the next day show him to have been "insane" during those about eight hours within meanings ascribed to the word "insane", as it appears in said Code Sec. 3-801, by the Georgia Supreme Court and Court of Appeals.

Another question presented for review is whether or not, if his allegations in said paragraphs show him to have been, in effect, "insane" during said about eight hours within such ascribed meanings given to that word by said two Georgia appellate courts, it was mandatory that said part of Georgia Code Sec. 3-801 be applied and considered by the Court of Appeals in conjunction with said Sec. 3-1004 in determining whether his cause of action was barred by the lapse of time between time of occurrence of his injuries and time of filing of the original petition.

Another question presented for review is: Did the failure of the Court of Appeals to apply said Georgia Code Sec. 3-801 in conjunction with said Sec. 3-1004 if his said allegations in Paragraphs 15 through 19 of his petition as finally amended show him to have been "insane" within said meanings ascribed by the Supreme Court and Court of Appeals of Georgia, abridge any of his privileges and/or deprive him of "due process of law", as guaranteed to him by certain provisions in the Fourteenth Amendment to the United States Constitution?

Petitioner claims abridgment of his privileges as a citizen of the United States and violation of the "due process of law" provision in the Fourteenth Amendment to the Constitution of the United States in the next hereinafter quoted portions of a sentence of the Fourteenth Amendment, in that the hereinafter quoted part of Georgia Code §3-801 containing exceptions that toll the running of a statute of limitation were not properly applied and considered with hereinafter quoted §3-1004 of the Georgia Code, applicable statute of limitation, in the rendering of said judgment. Those portions of the sentence in the Fourteenth Amendment read:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law ....."

The Fourteenth Amendment, Article XIV, of the Constitution of the United States, appears as Section 815 of Title 1 of the Annotated Code of Georgia of 1933, (1936 Edition, Pages 47 and 48, Book 1).

In addition to the above-quoted part of the Fourteenth Amendment to the Constitution of the United States, this case and this petition for writ of certiorari for review of said judgment of the Court of Appeals, copy of which judgment and opinion delivered as to it appears on Pages i through iv of the Appendix hereto, involve Sections 801 and 1004 of Title 3

of the Code of Georgia, and Paragraph 8 of Section 102 of Title 102 of the Code of Georgia. Said Sections of the Annotated Code of Georgia are quoted next hereinafter.

Section 801 of Title 3 of the Georgia Code, Annotated, of 1933 (1936 Edition, Page 198) reads:

> "Person under disability-Infants, idiots, or insane persons, or person imprisoned, who are such when the cause of action shall have accrued, shall be entitled to the same time, after the disability shall have been removed, to bring an action, as is prescribed for other person".

Petitioner contends herein that at the time of occurrence of the injuries to his left foot and cutting off some of his toes thereon, involved in this action, about 5 P. M., September 16, 1961, until at least midnight of that date, as alleged in Paragraphs 16, 17, 18 and 19 of his petition as finally amended, he was an "insane person", within broad meanings ascribed to those words as they appear within the above quoted Georgia Code Section, that because of that disability that existed until at least midnight of said date of injury, the statutory time for commencing his action did not begin to run until the next day, September 17, 1961, and that his original petition, filed September 16, 1963, was filed within the required two-year statutory period. Said Paragraphs 16, 17, 18, and 19, of his petition as finally amended are contained in Pages iv through x of the Appendix attached hereto. He contends that

said Georgia Code Section 3-801, entitled "Persons under disability" should be considered and applied in connection with Section 3-1004 of the Georgia Code, which states the two-year statute of limitation applicable. The cross-bill of exceptions of the defendants, said Mr. and Mrs. Bailey, to the Court of Appeals of Georgia, shows that they have contended only said Section 3-1004 of the Georgia Code applied to this action.

Said Section 3-1004 of the Annotated Code of Georgia of 1933 (1936 Edition, Book 2, Page 222) is quoted next:

> "Injuries to the person. Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year."

Paragraph 8 of Section 102 of Title 102 of the Georgia Code, which paragraph relating to method of computation of time, is involved in this action. It is alleged in Paragraph 15 of the petition as finally amended in the Superior Court of Fulton County, Georgia, which paragraph being among the four paragraphs of the petition as finally amended contained in the Appendix hereto and beginning on Page iv thereof, that said injuries occurred about 5 P. M., September 16, 1961. The transcript of the record sent to the Clerk of this Court with this application for certiorari shows the petition was filed on September 16, 1963. September 16, 1961 was a Saturday, and September 16, 1963 was a Monday.

Paragraph 8 of said Section 102 of Title 102 of the Annotated Code of Georgia of 1933 (1965 or 1966 Pocket Supplement to 1936 Edition, Book 28) reads:

> "8. When a number of days is prescribed for the exercise of any privilege, or the discharge of any duty, only the first or last day shall fall on Saturday or Sunday, the party having the privilege or duty shall have until the following Monday to exercise such privilege or discharge such duty."

In this connection, it is pointed out that in Paragraph (3) of the opinion delivered on said judgment in the Court of Appeals of Georgia (Page iii of Appendix hereto) that it was stated:

> "By amendment to his petition the plaintiff alleged in substance that due to the pain and suffering he endured for two days after the injury coupled with anesthesia having been administered to him, he was in a state of shock, mentally incompetent to transact business and was insane. These things he contends tolled the running of the statute for two days following his injury. See Code Sec. 3-801. There is no merit in this contention."

The only paragraphs in the petition as finally amended in which there are allegations as to the plaintiff's mental and physical condition immediately after he sustained said injuries are those contained in the Appendix hereto (Pages iv

through x of Appendix). It is requested that reference be made to said paragraphs in the Appendix. It is respectfully stated that there are no allegations in said paragraphs or in any other paragraph of the petition as finally amended showing that petitioner contended a tolling of the running of the statute for two days next following his accident. He has contended that it was tolled for only one day, not two. The fact that he alleged he was in the condition stated in said hereinbefore quoted paragraph of the opinion of the Court of Appeals of Georgia until about 1 A. M., September 17, 1961, which was next day following his accident does not indicate he alleged he was in that condition for the remaining twenty-three hours of that day. The tolling of the statute of limitation for one day was sufficient to bring the filing of his petition clearly within the required two-year period.

The original petition of the undersigned in the Superior Court of Fulton County, Georgia was filed by him on September 16, 1963, copy of it and process served upon James T. Bailey and Mrs. James T. Bailey on September 20, 1963. In the petition, he sought damages for some of his toes, including his largest toe, on his left foot having been cut off and part of that foot having been seriously injured by the blade of a power lawn mower on a grass lawn in Atlanta, Georgia on September 16, 1961, while he was operating the mower, which he had rented from the owners, said two defendants. He alleged, among other things, in the petition negligence by the defendants in renting to him said mower, which he alleged lacked certain safety features and was unsafe and dangerous for him to operate, he being completely inexperienced in operation of such kind of mower and said defendants being aware of that.

Counsel for the defendants filed, among other demurrers, a general and special demurrer, invoking bar of a two-year statute of limitations contained in Georgia Code §3-1004, which required the bringing of such an action within two years from the time cause of action arose. After hearing of the demurrers, the Trial Judge overruled said general and special demurrers. The defendants, after filing a motion for rehearing and after denial of that motion, in effect, appealed from that part of the order of February 4, 1965, overruling said demurrers and the order denying their motion for rehearing

and reconsideration to the said Court of Appeals. That Court of Appeals, in its order entered on September 8, 1965, reversed the ruling of the Trial Judge overruling that said general demurrer. In their said demurrers, the defendants' counsel contended, in effect, the petition was filed one day too late under said statute.

Georgia Code §3-801 contains certain exceptions to said §3-1004, upon which defendants relied. One exception in said §3-801 of the Georgia Code provided in effect that a statute of limitations would be tolled as to an insane person for the period of his insanity.

In a number of unreversed decisions rendered by the Court of Appeals and Supreme Court of Georgia, they in effect ruled a person was "insane" within the meaning of that word as it appeared in said §3-801 during a period that he did not have the mental capacity to transact business, or that he was mentally unable to contract, or that his mind was so unsound that he was unable to comprehend the meaning and significance of what he did or failed to do, or that he was totally mentally and physically disabled.

In his petition, the undersigned alleged his injuries occurred about 5 P.M., September 16, 1961, that he was carried to an Atlanta hospital in an ambulance within about a half hour thereafter, that because of severe pain and resulting shock from time of his injuries, about 5 P.M., until about 10 P.M. that night he was only semi-conscious, and that from about 10 P. M. until about 1 A. M., the next

morning, September 17, he was unconscious from the continued administering of anesthesia while an operation was being performed on his foot and remaining parts of some of his toes. He further alleged that because of said condition he was unable to transact any business during that period, was totally mentally and physically disabled, and was unable to understand the significance of what he did or failed to do.

A copy of said judgment of the Court of Appeals is attached hereto, in Appendix.

On Page 2 of the opinion and judgment appears the following sentence:

> "These things he contends tolled the running of the statute of limitations for two days following his injury."

However, he did not in his petition, as finally amended, allege any such disability to extend over a second day, or make any contentions in his briefs that the statute of limitations was tolled for more than one day, September 16, 1961.

The stage in the proceedings in the court of first instance, which was the Superior Court of Fulton County, Georgia, in which the questions now federal questions sought to be reviewed, in effect, were raised was by special and general demurrers of the defendants, invoking bar of two-year statute of limitations, demurrers first filed more than a year after the defendants had been served with copies of the petition and process. Petitioner contends that the reversal, on the cross-bill of exceptions by the defendants, by the Court of Appeals of Georgia of the overruling of said demurrers, under the circumstances and conditions shown herein, was an abridgment of privileges and a violation of his rights under the "due process of law" provisions in the Fourteenth Amendment to the United States Constitution, and that a federal question was raised.

The order of the Trial Judge overruling said demurrers, referred to in the order as Grounds Four and Five of the defendants' demurrers, appears on the blue-number page 77 of the certified transcript of the record of the Court of Appeals of Georgia.

Said Grounds Four and Five of the demurrers of the defendants, filed December 16, 1964, which was more than one year after service of copy of petition and process upon the defendants, are excerpted on the blue-number pages 70 and 71 of the certified copy of transcript of the record of said Court of Appeals, the date of filing of the demurrers being shown on said blue-number Page 71. That the Trial Judge also denied a motion of the defendants for summary judgment based on contention of bar by said statute of limitations is shown by his order on blue-number Page 79 of said certified transcript of record.

The reversal by the Court of Appeals of Georgia, in its judgment of September 8, 1965, of that part of the order of the court of the first instance overruling said general demurrer invoking the bar of statute of limitations raised said federal question as to violation of provisions in the Fourteenth Amendment to U. S. Constitution. Said judgment and opinion thereon appear on blue-number Pages 80 through 83 of said certified transcript of record that accompanies this petition for certiorari.

"Where a person has a cause of action for personal injuries against a municipal corporation for which, as a condition precedent to its enforcement, he is required to give the statutory notice provided for in Code Ann. §69-308, and where, as a result of the occurrence giving cause to the right of action, such person becomes mentally and physically incapacitated so as to be incapable of acting for himself in carrying on his business and prosecuting his claim, and where no guardian is appointed for him, the time limit for giving the statutory notice of his claim is tolled until such time as regains capacity to act for himself, or until such time as one bona fide acting for him as next friend actually gives the defendant municipality such notice, and where suit is brought thereafter by such next friend during the continuing disability of the plaintiff showing a notice given to the defendant more than 30 days prior to the filing thereof is not subject to general demurrer on the ground that such timely notice was not given.

.....

"In the argument of counsel before this Court, the sole question presented for decision is whether, under the facts alleged in the petition, the running of time under the provisions of Code Ann. Sec. 69-308 inquiring that notice of injuries or damages be given a municipality within six months of the date of such injuries or damages sustained is tolled under the provisions of Code Sec. 3-801 so that the plaintiff is not barred by his failure to give the statutory notice

"to the munipality within six months from the date his right of action on account of his injuries and damages sustained occurred."

City of Atlanta vs. Barrett, next friend, 102 Ga. App. 469.

Insane persons, who are such when the cause of action accrues, shall be entitled to the same time to bring an action after the disability is removed as is prescribed for other persons under the Code, who are under disability. The present suit was not barred.

Brown vs. Carmichael, et al, 149/548 (3) (101 S.E. 124).

"2. A plaintiff may amend his petition in such manner as to cure the pleading of the defendant that it appears therefrom that the right of action is barred by the statute of limitations by setting up other facts showing that the limitation has been tolled.

Pendley vs. Powers, 129 Ga. 69 (58 S.E. 653);

Collier vs. Georgia Securities Co., 57 Ga. App. 485 (105 S.E. 920)"

Howell vs. Seigler, 89 Ga. App. 222 (178 S.E., 2d 874).

"4. Incompetent wife was not barred by laches from having divorce decree set aside.

Code Sec. 3-801".

.....

"[5] Counsel for defendant relies on laches. There is no merit in the contention that the wife is barred by laches..
....."

Johnnie L. Lowery vs. W. L. Browning Next Friend
212 Ga. 586, 94 S.E. 2d, 413, 416.

Period during insanity which owner of land was insane could not be counted in favor of one claiming title by prescription to complete the statutory period necessary to prescriptive title.

Lawrence vs. Boswell, 118 S.E. 45, 155 Ga. 690.

Where the father of an infant ..... after attainment of majority by the infant, and while the child is totally without mental capacity to contract, deeds to the child a portion only of the property to which he is legally entitled, and takes from the child a deed of conveyance to other portions of the property in excess of that to which he is legally entitled, and also takes from the child a receipt purporting on its face to be in consideration of a full settlement between the father and child, such a settlement and mutual exchange of deeds will not bar the right of action on the part of the child after the lapse of 16 years, it appearing that the child during that time was without mental capacity to comprehend the nature of a contract, or his legal rights
.....

Taylor vs. Colley, et al, 138 Ga. 41 (74 S.E. 694)

"Insanity of a temporary nature resulting from the wound or injury .... held in Alabama Power Company v. Shaw, 215 Ala. 463, 111 So. 17, to be within the exception to the running of the statutes of limitation, such exception not being necessarily restricted to a chronic or fixed condition".

9 ALR 2d 966.

"(a) Such action was not barred by the statute of limitations, since the petition alleged that the grantor did not have the mental capacity to transact any business during the time in question.
.....

"See, in this connection, the Code, §§3-801, 85-411;
Mayer v. Waterman, 150 Ga. 613 (1) (104 S.E. 497);

Morris v. Mobley, 171 Ga. 224 (2) (155 S.E. 8), and citations."

Mullins vs. Barrett, et al, 204 Ga. 11 (1-a), 48 S.E. 2d 842."

Considering plaintiff's allegations in Paragraphs 16, 17, 18 and 19 of his petition, as finally amended, as to his mental and physical condition from 5:00 P.M., September 16, 1961 to 1:15 A.M., September 17, 1961, and the fact that his petition was filed on September 16, 1963, it is evident that his petition, as finally amended, does not show on its face that the action is barred by the statute of limitations.

It appears from the record that the

defendants never filed or served any general or special demurrer on the ground of a bar of the action by the statute of limitations until more than a year after the petition had been filed, and until there had been one or more amendments to the petition filed by the plaintiff, after allowance. It seems that the defendants were too late in filing their said general and special demurrer on the grounds of the cause of action being barred by the statute of limitations. The appeal record in this appeal and cross appeal discloses that in the latter part of 1964 the defendants filed a motion for summary judgment on their plea of their action being barred by a statute of limitation; that a hearing of the motion was held, and, upon consideration of depositions, affidavits and pleadings of the parties on file, motion was denied.

The following citations of decisions show that when it does not affirmatively appear on face of pleadings of a plaintiff that his action is barred by a statute of limitations, of any attempted defense as to limitation is a matter for a plea, not a general or special demurrer:

> "Where it does not affirmatively appear upon the face of the declaration that the cause of action is barred by the statute of limitations, this defense cannot be made by general demurrer setting up that the action is barred by the statute, but is a matter for plea."

Stringer vs. Stringer, 93 Ga. 320(2), (20 S.E. 242);

Powell, et al vs. McKinney, 151 Ga. 803 (3) (108 S.E. 231).

"1. ..... The bar of the statute of limitations is a personal privilege, and is not available to the defendant unless specially asserted either by a special plea, or (where the bar appears upon the face of the petition by a special demurrer .....
Powell vs. McKinney, 151 Ga. 803, (3), (108 S.E. 231)

Burch vs. Wofford - Terrell Co." 52 Ga. App. 685 (184 S.E. 419).

1. No question as to the applicability of the statute of limitations ..... can be raised by a general demurrer to the petition; but ....., if relied on, must be made the subject of special demurrer or special plea, according to whether the facts justifying such objection appear upon the face of the petition or depend upon extraneous proof ....."

Darnell vs. Toney, 39 G. App. 810 (148 S.E. 279).

Petitioner is not subject to general demurrer for failure to show affirmatively that action is not barred by statute of limitations.

Felton vs. State Hwy. Board, et al, 47 App. 615 (171 S.E. 198)

In Webster's Unabridged New International Dictionary, Second Edition, 1960, the word "insanity" is defined as follows:

"1 a. State of being insane; unsoundness or derangement of mind, ..."
. . . . . .
....."The nature and degree of insanity required to affect a person's civil capacity varies with the nature of the case, the general test being as to whether with respect to the matter in hand the person can act rationally, understanding the nature of his act and the natural consequences of it in affecting his rights, obligations, and liabilities."

In 34 Am. Juris. - Limitation of Actions, §186, p. 150, it is stated:

"The modern rule of construction is that unless ground can be found in the statute for restraining or enlarging the meaning of its general words, it (an exception) must receive a general construction, and the courts cannot arbitrarily subtract therefrom or add thereto ...
....."

In 54 C.J.S. Limitations of Actions, §242; pp. 268 and 269, it is stated:

"This disability (insanity) is now generally the subject of exception in the various limitation statutes, either suspending the beginning of the operation of limitations until the disability is removed or granting an additional period after that time, ..."

"The term 'insane' as used in this connection, has been given a generic, rather than a technical meaning, and

"it has been held to mean such a condition of mental derangement as actually to bar the sufferer from comprehending rights which he is otherwise bound to know, and the exception has been held to embrace temporary unsoundness of mind as well as chronic or fixed insanity.

"'Insanity' is the generic term for all unsound and deranged conditions of the mind.

Burnham vs. Mitchel, 34 Wis. 117,136".

In 32 Corpus Juris., P. 594, it is said:

"'Insanity' is a broad, comprehensive, and generic term, of ambiguous import for all unsound and deranged conditions of the mind ..... And it ordinarily implies every degree of unsoundness of the mind, whether it is casual, temporary or permanent."

The following additional citations are given:

In statute tolling period of limitation during time that person entitled to bring action is insane, the term "insane" means such a condition of mental derangement as actually to bar the sufferer from comprehending rights which he is otherwise bound to know and embraces temporary unsoundness of mind as well as chronic or fixed insanity.

Gottesman vs. Simon, 337 P, 2d 906,907, 909, 169 Cal. App. 2d, 494.

The law, therefore, distinctly recognizes that species of insanity where the subject is deprived of his reason but a portion of the time, or deprived of his reason either temporarily or permanently only on certain subjects. Instances of this character are not rare.

Clarke vs. Irwin, 88 N.W. 783, 785, 63 Neb. 539.

The word 'insane' as used in an exception to the statute of limitations in favor of persons suffering disability includes one who is mentally incompetent to manage his own affairs .....

Browne vs. Smith, 119 Colo. 469, 205 P 2d 239. 9 ALR 2d 961.

In Johnson vs. N. & N. B. Ins. Co., 83 Me. 182, 22 A 107, the Court, speaking as to meaning of the word "insanity" said:

"When this word occurs, unexplained or unlimited, in any statute ..... it signifies any derangement of the mind that deprives it of the power to reason or will intelligently".

It is stated in Section 202, on P.162 of 34 Am. Juris. "Limitation of Actions":

"As a general rule it is not necessary that a person be adjudged insane to bring him within an exception on ground of mental incapacity. It seems that a person may be under a legal disability or of unsound mind within the meaning of an exception

"in the statute, as a result of excessive use of morphine ....."

The following are some definitions of or meanings assigned to the word "insanity" or "insane" in Words and Phrases, Vol. 21 A, Page 341:

"Word 'insanity' is not a legal term. In law books and judicial opinions it is used in its popular sense, and signifies an unsoundness of mind and derangement of the intellect.

It may be complete or partial.

State vs. Lehman, 49 N. W. 3, 5, 2 S.D. 171".
(Emphasis added)

"Word 'insane' ordinarily implies every degree of mental derangement, from temporary nervous excitement to acute insanity, and therefore includes extreme case of an entire want of understanding.

Okla. Natural Gas Corp. vs. Lay, 51 P 2d 580, 582, 175 Okla. 75".

"'Insanity' is a generic term embracing all kinds and conditions of mental derangement.

State vs. Brimlett, 36 N.W., 2d, 450, 458, 240 Iowa 338".

WHEREFORE, it is respectfully prayed that this petition for writ of certiorari for review of said judgment of the Court of Appeals of Georgia be granted.

CHARLES E. MUSKETT
Attorney for Petitioner,
Wyman C. Lowe

(One copy of this petition signed by Charles E. Muskett)

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AFFIDAVIT IN PROOF OF SERVICE

COUNTY OF FULTON

STATE OF GEORGIA

I hereby certify that I have on this date, June 8, 1966, served a copy of the foregoing and within petition for writ of certiorari, in behalf of my attorney of record, Mr. Charles E. Muskett, upon said respondents in certiorari by myself delivering a copy to the law offices of counsel of record for said respondents, Nall, Miller, Cadenhead and Dennis, Bank of Georgia Building, Atlanta, Georgia, and handing a copy to the secretary of Mr. Paul Cadenhead, a member of said law firm. I practice law in Atlanta, Georgia.

Wyman C. Lowe

WYMAN C. LOWE

Duly sworn and and subscribed to before me this date, June 8, 1966.

Beverly L. Dunn

NOTARY PUBLIC

Notary Public, Georgia, State at Large
My Commission Expires March 18, 1969

(One copy of this Affidavit signed by Wyman C. Lowe and witnessing Notary Public)

(SEAL AFFIXED)